Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of ACS of Anchorage, Inc. Pursuant to	)	
Section 10 of the Communications Act of 1934, as	)	WC Docket No. 05-281
amended, for Forbearance from Sections 251(c)(3)	)	
and 252(d)(1) in the Anchorage LEC Study Area	)	
	)	

COMMENTS OF MATANUSKA TELEPHONE ASSOCIATION, INC.

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SUMMARY

ACS has demonstrated that it qualifies under the standards of section 10(a) of the Communications Act of 1934, as amended (the "Act"), for forbearance from the unbundling obligations of section 251(c)(3) of the Telecommunications Act in the Anchorage local exchange market. The petition provides compelling evidence that the Anchorage market has strong intermodal competition meeting the standards established by the Commission in the recent *Qwest Forbearance Order* for the limited forbearance sought by the incumbent. Significantly, GCI will not be impaired in competing in the Anchorage market without access to ACS' UNE loops; instead, it has elected not to complete development of its cable infrastructure in order to compete with ACS on a facilities basis for purely economic reasons. The Regulatory Commission of Alaska has recently ruled that GCI's effort to arbitrage the economic benefits of access to UNEs at TELRIC rates in place of completing its own competitive network in another local exchange service area is not in the public interest. Grant of ACS' petition will advance the goal of the Act to encourage facilities-based competition at the local exchange level. It will also curtail subjecting ACS to inherently unfair asymmetric competition in relation to GCI. Finally, GCI's elective reliance on UNEs in the Anchorage market is not a legitimate basis for the Commission to withhold forbearance from requiring ACS to continue to provide access to unbundled network elements. Section 10(a) is an integral component of the Act's pro-competitive, deregulatory objective and its use should not be avoided where it can have a practical impact on competition in a competitive local exchange market.

Matanuska Telephone Association, Inc. ("MTA"), by its undersigned counsel, hereby comments on the petition of ACS of Anchorage, Inc. ("ACS") for forbearance from sections 251(c)(3) and 252(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 251(c)(3), 252(d)(1).[1] For the reasons set forth below, MTA supports ACS's petition for relief pursuant to section 10 of the Act, 47 U.S.C. § 160, and urges the Commission's expeditious approval of the petition.

I. BACKGROUND

MTA is a rural telephone cooperative organized under the Alaska Electric and Telephone Cooperative Act and is certificated by the Regulatory Commission of Alaska ("RCA") to provide local exchange service. MTA was created in 1953 by approximately 40 original members who accepted responsibility for the fledgling telephone service originally provided by the municipality of Palmer. During its 50-year history, MTA has grown to serve approximately 40,000 members spread over some 10,000 square miles. It has approximately 59,000 access lines and in 2004 had consolidated revenues of $87 million.[2]

GCI is a publicly traded company that in 2004 had consolidated revenues of $424.8 million.[3] It considers itself "one of the nation's premier integrated telecommunications providers,"[4] and is the largest such operator in Alaska. GCI holds leading market shares in the state for long-distance, cable television and Internet access services. It has also gained significant market share in the local exchange markets in which it competes. It has

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[1] DA 05-3145, released December 5, 2005.

[2] MTA's wholly owned subsidiaries provide cellular, resold, long-distance, dial-up Internet, DSL and video programming services.

[3] GCI Form 10-K filed with the SEC for the year ending December 31, 2004 ("GCI 2004 Annual Report"), at 17.

[4] GCI Website, www.gci.com/about/index.htm.

approximately 50% of the market in Anchorage, 32% in Juneau and 28% in Fairbanks. GCI also has high name recognition throughout Alaska, and the majority of its customers purchase multiple services from it.[5]

In MTA's rural study area, GCI provides cellular, cable television, Internet access and long-distance services. It recently received authorization from the RCA to provide local exchange service throughout MTA's study area.

Over 11,000 of MTA's local exchange customers subscribe to GCI's cable services, which means that these customers already have a significant customer relationship with GCI. Many of these cable customers also subscribe to GCI's cable modem Internet service. In addition, MTA estimates that over 24,000 of its local exchange customers subscribe to GCI's long distance service. As a result, approximately 40% of MTA's customers have an established relationship with GCI for their telecommunications needs. GCI operates retail store offices throughout the state, including in Palmer, Wasilla and Eagle River, all of which are located in Matanuska's study area.

II. DISCUSSION

A. ACS is Entitled to Forbearance From Section 251(c)(3) of the Act in Anchorage

As evidenced by the comprehensive data assembled in ACS's petition, under the standards set forth in section 10(a) of the Act, 47 U.S.C. § 160(a), ACS is entitled to forbearance from the unbundling obligations of section 251(c)(3) of the Act in ACS's Anchorage study area.[6] ACS has demonstrated that the Anchorage local exchange market is highly competitive, resulting

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[5] GCI 2004 Annual Report, at 19.

[6] Since MTA believes that ACS' petition for forbearance from the obligation to provide access to UNE loops in Anchorage is meritorious, it submits that the Commission does not need to address ACS's alternative request for relief from the pricing standards of section 252(d)(1) of the Act, which would be mooted by grant of ACS' request for relief from unbundling.

in ACS's loss of market share at a pace far greater than the national average for incumbent local exchange carriers.[7] Although the Commission did not publicly disclose the local exchange market share that Cox Cable has won from Qwest in its recent order granting forbearance from section 253(c)(3) to Qwest in the Omaha MSA,[8] GCI's almost 50% gain of market share from ACS in Anchorage must surely meet this standard.

Of equal importance, ACS presents evidence in its petition that GCI's cable system passes some 98% of the homes in the Anchorage market.[9] GCI also maintains high-capacity loops and dark fiber loops of its own throughout the Anchorage market on which it could, but has not, provided service to other carriers.[10] GCI provides all of its own switching services and is collocated in all five of ACS' central offices in the market and in two remote locations where ACS has placed switches.[11] It does not rely on ACS for any transport facilities in Anchorage.

In the *Qwest Forbearance Order,*[12] the Commission held:

> "[In the *Triennial Review Remand Order,*] the Commission announced that it might one day be appropriate to conclude, based on sufficient facilities-based competition, particularly from cable companies, that the state of local exchange competition might justify forbearance from UNE obligations [citation omitted]. Today, that expectation is realized. We find that competition for telecommunications services is sufficiently developed in certain wire centers that the section 251(c)(3) obligation to provide unbundled access to loops and transport is no longer necessary to ensure that, in the Omaha MSA, Qwest's "charges, practices, classifications, or regulations...are just and reasonable and are not unjustly or unreasonably discriminatory"."

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[7] ACS Petition, at 30, n. 134.

[8] *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, FCC 05-170, released December 2, 2005 (hereinafter, *"Qwest Forbearance Order"*).

[9] ACS Petition, Exhibit J, at 5.

[10] *Id.*, at 12. GCI services certain office buildings and other major customers in Anchorage using its own fiber facilities.

[11] *Id.* at 10-11.

[12] *Qwest Forbearance Order*, ¶ 63.

This analysis is equally applicable to the situation that exists in the Anchorage market. Further, in the *Qwest Forbearance* Order,[13] the Commission made clear that section 251(c)(3) forbearance is appropriate in a market even where the competitor's network does not cover at all points the same customers that the incumbent's network reaches. In the Anchorage market, where GCI's combination of hybrid fiber coaxial ("HFC") cable and fiber optic plant provides virtually ubiquitous coverage throughout all residential and commercial sectors, even this concern on the part of the Commission warrants little weight.

Moreover, contrary to the broader scope of relief sought by Qwest in the Omaha MSA, ACS is requesting forbearance only from its obligation to provide access to its UNE loops; it has expressly agreed to continue to permit its competitors to resell its services at wholesale rates.[14] Thus, the scope of relief sought by ACS is relatively narrow, and should cause no practical impairment to GCI's competitive position in the Anchorage market.

The fact of the matter is that GCI is not the kind of start-up competitor that section 251(c)(3) of the Act was intended to protect. It does not need to make infrastructure investment decisions before having the benefit of a revenue stream with which to fund such investment. Indeed, it already enjoys a revenue stream greater than that of the incumbent operator, and faces only the decision of whether and when to make the incremental investment needed to upgrade its fully digital, two-way cable network to provide telephone service.

Indeed, approval of ACS's forbearance petition will serve the purpose of the Act, which is to advance facilities-based competition, by encouraging GCI to rely on and develop the infrastructure it has in place as its basis for its competing in the Anchorage market, rather than permitting it to take advantage of ACS's network investment.

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[13] *Id.*, ¶ 70.
[14] ACS Petition, at 3.

B. GCI Will Not Be Impaired in Competing in Anchorage Without Access to UNE Loops

In the *Qwest Forbearance Order*,[15] the Commission found that Cox Cable is providing effective intermodal competition to Qwest in portions of the Omaha market through use of its own, extensively deployed last-mile cable facilities. The record in the instant proceeding demonstrates that GCI has equal capability to that of Cox to compete with the incumbent provider on a facilities basis, but has elected not to do so for economic reasons.[16] In testimony given by GCI to the RCA, as well as in the public statements of GCI's CEO and other executive officials,[17] GCI has made clear both its capability and intention to transition its customers in Anchorage from UNE loops acquired from ACS to its own cable telephony facilities. However, the pace at which it will execute this migration is dependent on the price at which such unbundled facilities are made available.

In effect, GCI's request for access to UNE loops in the Anchorage market is not motivated by any operational impairment, but by a desire to control when and how GCI will make its investment to deploy its own facilities in competition with the incumbent. This clearly is not the purpose that section 251(c)(3) of the Act was intended to serve. MTA submits that the public interest of ACS' petition should be judged in this context.

The Alaska state regulatory commission has made important findings regarding GCI's lack of impairment in the absence of UNEs that should inform the Commission's decision in this proceeding. In its application a year ago to the RCA for certification as a local exchange carrier

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[15] *Qwest Forbearance Order*, ¶ 59.

[16] *See* GCI 2004 Annual Report, at 32: "As a converged platform, cable is a viable competitive alternative outside its traditional video space, not only in the broadband space as a competitor with technology such as DSL, but also in traditional telephony services as voice becomes another application that is carried on data centric networks."

[17] ACS Petition, at 2-3, 7-9, 12-13.

in a number of new markets, including MTA's study area, GCI represented to the state regulatory commission that it is fit, willing and able to provide service throughout the requested service areas without benefit of either UNEs or resale services at wholesale rates.[18] In a supplementary filing to the RCA, GCI affirmed that it was prepared to rely on the HFC lines of its cable affiliate, supplemented only by resale services at retail rates available pursuant to section 251(b) of the Act and, in a few instances, wireless local loop to provide competitive services throughout MTA's and other incumbent carriers' service areas.[19] Based on this representation, the RCA has approved GCI's application to provide local exchange service in a number of its requested markets, including MTA's.

Within a month of filing its application, however, and prior to submission of its March 2005 supplementary filing, GCI formally requested MTA to begin good faith negotiations for unbundled network elements, pursuant to sections 251 and 252 of the Act.[20] In response to this demand, MTA successfully petitioned the RCA under section 251(f)(2) of the Act for suspension of its obligation to provide GCI's access to UNE loops in its service area. In its decision, a copy of which is attached to these Comments as **Exhibit A**, the state commission rejected GCI's impairment argument, finding that it had made inconsistent assertions regarding its need for

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[18] *Application by GCI Communications Corp. for an Amendment to its Certificate of Public Convenience and Necessity to Operate as a Competitive Local Exchange Telecommunications Carrier*, Docket U-05-4; at 3-4.

[19] Docket U-05-4, Letter from James R. Jackson Jr., GCI Regulatory Attorney, dated March 22, 2005, at 3-4.

[20] MTA had lost its rural exemption relative to GCI when it commenced provision of video services.

UNEs to compete effectively in MTA's market, including in its original application for certification.[21]

Although GCI had given testimony – similar to the representations cited by ACS in the present petition – that it intended to migrate its subscribers in MTA's study area to its own cable facilities, the RCA found that the economic advantages and decreased risks made available to GCI by its access to UNEs at TELRIC rates created a disincentive for GCI to deploy its own facilities.[22] Taking into account the relative size and scope, financial resources and economies of scale of GCI in relation to MTA, and its greater ability to withstand loss of revenue and market share than the competitor, the RCA concluded that it was not in the public interest to require MTA to provide the larger competitor with access to its UNE loops at TELRIC rates.[23]

MTA's successful case before the RCA included testimony by Mr. Michael Burke, MTA's utility finance expert witness, who demonstrated that GCI's reliance on UNEs, notwithstanding the existence of extensive GCI-controlled network infrastructure, represents a technique for shifting the risk of market development from itself to the incumbent carrier, at the risk of that operator. Mr. Burke's comparative analysis of the economic benefit to GCI from use of ACS UNE-L in the Anchorage, Fairbanks and Juneau markets (copy attached to these Comments as **Exhibit B**) reveals that the cost of payment per unbundled loop at TELRIC rates, weighed against USF receipts and avoidance of access charges, produces a positive cash flow to GCI even prior to consideration of end user revenues that GCI will collect from customers on the

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[21] *Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 filed by Matanuska Telephone Association, Inc.*, Order U-05-46(8), issued December 20, 2005 ("*MTA S&M Order*"), at 40-41.
[22] *Id.*, at 14.
[23] *Id.*, at 44.

loop. This is true in the Anchorage market even though high cost loop support is nominal.[24] In essence, Mr. Burke showed that the incumbent carrier actually pays GCI to provide local service under the UNE competition scenario, producing a striking competitive advantage to GCI and disadvantage to the incumbent.

In summary, GCI's argument for access to ACS' UNEs in the Anchorage market, consistent with its UNE strategy in general, is not designed to overcome operational impairment, but instead to enable GCI to arbitrage the UNE rate against access savings and USF receipts. This technique affords GCI extraordinary economic choices regarding where and when to target its investments dollars to deploy its own facilities in competition with the incumbent operator. Requiring the incumbent operator to support reducing the risks of its competitor's entry into the market in this manner is clearly a distortion of the original purpose contemplated for UNE competition under sections 251(c)(3) and 251(d)(2) of the Act. This analysis demonstrates the compelling merit of ACS's petition for forbearance from its unbundling obligations in the Anchorage study area, at least in relation to GCI.

C. Grant of ACS's Petition Would Advance Facilities-Based Competition in the Anchorage Market

The Commission has long expressed its preference for facilities-based competition over the use of UNEs.[25] In the *Qwest Forbearance Order*, the Commission acknowledged that

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[24] For rural carriers like MTA, GCI's access to UNEs would have a particularly devastating effect, since the TELRIC price bears no relationship to imbedded revenue streams of high cost support and access charge bypass. When GCI is serving a rural area that is eligible for high cost support, it can arbitrage the UNE rate against the portability of high cost support to create a significant negative cost to provide service.

[25] *See Unbundled Access to Network Elements*, FCC 04-290, released February 4, 2005 ("*Triennial Review Remand Order*"), ¶ 218; *Implementation of the Local Competition Provisions*

permitting new market entrants the right to compete with incumbent LECs by leasing at cost-based rates UNEs of the incumbents own networks constitutes a "high degree of regulatory intervention." Such intervention results in a number of costs, including reducing the incentive of both the incumbent and the competitor to invest in facilities and innovation, and creating complex issues of managing shared facilities.[26] Reflecting this same concern in its decision denying GCI access to UNEs on MTA's network, the RCA quoted the Commission as follows:

> "[W]e have come to recognize more clearly the difficulties and limitations inherent in competition based on the shared use of infrastructure through network unbundling. While unbundling can serve to bring competition to markets faster than it might otherwise develop, we are very aware that excessive network unbundling requirements tend to undermine the incentives of both ILECs and new entrants to invest in new facilities and deploy new technology... ."[27]

Approval of ACS's petition for forbearance will advance this policy objective of the Act in the context of the Anchorage market. The record evidences that GCI has the infrastructure through which to offer facilities-based competition to ACS, and it should be encouraged to make the additional incremental investment necessary to implement such competition in the public interest.

D. It is Not in the Public Interest to Subject ACS to Asymmetric Regulation

In addition to the public interest factors discussed above, denial of ACS' petition would unnecessarily and unfairly prolong asymmetric regulation of ACS and GCI as competitors in the Anchorage market. As a competitive carrier, GCI is not subject to the unbundling obligations of

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of the Telecommunications Act of 1996, 15 FCC Rcd 3696, 3701 (1999); *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 563 (D.C. Cir. 2004).

[26] *Qwest Forbearance Order*, ¶ 76.

[27] *MTA S&M Order*, at 46, citing *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 19020 (2003) ("*Triennial Review Order*").

section 251(c)(3) of the Act faced by the incumbent. Thus, even though GCI operates fiber loops of its own to which ACS and possibly other competitors would like to have access, GCI is not required to provide access to those facilities to its competitors and, in fact, has "vehemently opposed" ACS's request for unbundled loop reciprocity during interconnection agreement negotiations.[28]

Both this Commission and the Alaska state regulatory commission have recognized the inherent unfairness of this circumstance. As stated by the Commission in granting Qwest forbearance from section 251(c)(3) obligations in certain portions of the Omaha MSA:

> "Once the benefits of competition have been sufficiently realized and competitive carriers have constructed their own last-mile facilities and their own transport facilities, we believe that it is in the public interest to place intermodal competitors on an equal regulatory footing by ending unequal regulation of services provided over different technological platforms. Even though Qwest and Cox each provide service over their own facilities to [REDACTED] narrowband customers in the Omaha MSA [footnote omitted], Qwest is subject to unbundling obligations while Cox is not. Our action today places Qwest and Cox on more equal footing in those wire center service areas where facilities-based competition is sufficiently developed such that taking this step to increase the level of parity in the local exchange market is appropriate."[29]

Grant of the pending petition for forbearance will similarly relieve ACS from such inherently unfair asymmetric regulation in the Anchorage market.

E. GCI's Reliance on UNEs in Anchorage Does Not Justify Denying ACS's Petition

In its *Qwest Forbearance Order*, the Commission noted that Qwest's competitors make relatively little use of access to UNE loops in the Omaha market and cautioned that it would be concerned with granting forbearance from unbundling obligations in a market in which

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[28] ACS Petition, at 13-14.

[29] *Qwest Forbearance Order*, ¶ 78. *See also* RCA analysis in *MTA S&M Order*, at 46.

"competition exists []only due to section 251(c)(3)."[30] The Commission cited in support of this curious observation an *ex parte* submission by GCI which argued that "a situation where the primary competitor has relied on UNE-L for customer acquisition raises very different issues than those before the Commission in the instant [Omaha MSA] proceeding." GCI, of course, was attempting to lay the basis for distinguishing the precedential effect of the *Qwest Forbearance Order* from the instant proceeding.

MTA strongly urges the Commission not to follow GCI's reasoning in this case. In the Anchorage market, GCI's ability to compete does not depend on the availability of UNE-L. To the contrary, GCI has chosen, for purely economic reasons, to use the incumbent's UNEs in place of offering facilities-based competition which it admits it is capable of providing. As explained in ACS's petition, GCI has laid out in its testimony to the RCA and in its pronouncements to the investment community its strategy of moving subscribers off of UNE facilities and onto its own cable plant, but only according to its own timetable.

The situation in Anchorage is akin to that identified by the Commission regarding enterprise telecommunications services in the Omaha MSA in the *Qwest Forbearance Order.*[31] Although Cox Cable has not yet made significant inroads in that enterprise market, the Commission concluded that Cox's "possession of the necessary facilities to provide enterprise services, its technical expertise, its economies of scale and scope, its sunk investments in network infrastructure, its established presence and brand in the Omaha MSA, and its current marketing efforts and emerging success" in that market lead to the conclusion that Cox poses a "substantial competitive threat" to Qwest in that sector. As a result, the Commission concluded that forbearance from enforcing Qwest's unbundling obligations for that sector was justified, as

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[30] *Qwest Forbearance Order*, ¶ 68, n. 185.
[31] *Id.*, ¶ 66.

well. In Anchorage, where GCI has made the conscious financial decision not to utilize its existing infrastructure but, nevertheless, for all the reasons identified in the *Qwest Forbearance Order* relative to Cox, poses a substantial competitive threat to ACS in that market, forbearance is equally justified.

In any case, ACS has made it clear in its petition that it will not withhold access by GCI to its UNEs (as GCI has done in response to ACS's request for access), but will ask that GCI negotiate for such access on the basis of commercial rates. Thus, under no circumstances will GCI be deprived of the opportunity to continue to make use of ACS's UNE loops. In addition, ACS is not attempting to withhold access by its competitors in Anchorage to its resale services at wholesale rates.

In the *Triennial Review Remand Order*, the Commission expressly encouraged incumbent LECs to file for forbearance from unbundling requirements where they believe the requirements for forbearance have been met.[32] The Commission would now effectively eviscerate section 10 of the Act if it were to determine that its should not be used in circumstances where its application can have some effect on the competitive market structure.[33] MTA urges the Commission to avoid this illogical result.

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[32] *Triennial Review Remand Order*, ¶ 39.

[33] As the Commission did in the *Qwest Forbearance Order*, the Commission can, in granting ACS's petition, mitigate any short-term disruption to GCI's customers supported by means of UNE-L by providing for a reasonable transition period.

F. ACS Should be Granted Forbearance Throughout the Anchorage Study Area

MTA agrees that the Commission should approve ACS's petition for the entire Anchorage study area.[34] ACS has demonstrated that, in light of GCI's extensive HFC cable and fiber optic plant, GCI's ability to compete throughout the study area is uniform, and forcing ACS to adopt different rates for different portions of the Anchorage market would lead to unnecessarily onerous facilities-sharing management requirements.

MTA is also conscious that selective approval of ACS's request on a wire-center basis can open the door to the competitor circumventing the effect of the Commission's ruling by structuring its network architecture in the Anchorage market to enable it to continue to secure UNE loops usable throughout the study area through a single wire center. In its recently concluded negotiation with MTA for resale services at wholesale rates, for example, GCI attempted to circumvent the parameters of the Commission's local number porting rules by declaring the establishment of a single "mega" wire center capable of serving MTA's entire multi-wire-center service area. This effort was rejected in an arbitrator's ruling.[35]

Grant of ACS' petition throughout the Anchorage study center – which is in any case relatively small in comparison to, for example, the Omaha MSA – will avoid potential efforts of this nature to misapply the Commission's ruling.

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[34] ACS Petition, at 26-29.

[35] *In the Matter of Petition of GCI Communication Corp. d/b/a General Communication, Inc. and GCI for Arbitration with Matanuska Telephone Association, Inc. Pursuant to 47 U.S.C. Sections 251 and 252*, RCA Docket U-05-76, Arbitrator's Decision, dated December 19, 2005, at 16-39.

CONCLUSION

For the reasons set forth above, MTA supports ACS' petition for forbearance from the unbundling requirements of section 251(c)(3) in the Anchorage market, and urges the Commission to move expeditiously in granting the petition in order that ACS may be placed on a fair playing field with its prime competitor at the earliest possible time.

Respectfully submitted

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January 9, 2006

STATE OF ALASKA

THE REGULATORY COMMISSION OF ALASKA

Before Commissioners: Kate Giard, Chairman
Dave Harbour
Mark K. Johnson
Anthony A. Price
James S. Strandberg

In the Matter of the Petition for Suspension and Modification of Certain Section 251(c) Obligations Pursuant to Section 251(f)(2) of the Telecommunications Act of 1996 filed by MATANUSKA TELEPHONE ASSOCIATION INC.	U-05-46 ORDER NO. 5
In the Matter of the Petition of GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATIONS, INC. and GCI for Arbitration with MATANUSKA TELEPHONE ASSOCIATION, INC., Pursuant to 47 U.S.C. Sections 251 and 252	U-05-76 ORDER NO. 2

ORDER GRANTING PETITION FOR SUSPENSION AND MODIFICATION OF CERTAIN ARBITRATION OBLIGATIONS

BY THE COMMISSION:

Summary

We grant MTA's[1] petition to temporarily suspend its obligation to arbitrate an interconnection agreement with GCI,[2] including the services described in 47 U.S.C. § 251(c)(1)-(6), but excluding resale at wholesale[3] and the related obligation to

[1]Matanuska Telephone Association, Inc.

[2]GCI Communication Corp. d/b/a General Communication, Inc. and GCI (GCI).

[3]47 U.S.C. § 251(c)(4).

Exhibit A

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negotiate in good faith.[4] This suspension will remain in effect while we consider MTA's request for a three-year suspension of certain interconnection obligations.

Background

MTA received a letter from GCI on February 28, 2005,[5] requesting that the two companies negotiate the terms of an interconnection agreement under Sections 251 and 252 of the Telecommunications Act.[6] On May 27, 2005, MTA filed a petition for suspension and modification[7] of certain Section 251 responsibilities. Docket U-05-46 was opened to address MTA's petition. MTA requested that we suspend its obligation to negotiate and arbitrate any provision of the interconnection agreement with GCI, including services described under Section 251(c)(1)-(6) except for resale at wholesale and the related duty to negotiate in good faith. MTA asked that this suspension remain in effect for three years, plus two additional, one-year periods, in the event there is a continued showing of undue economic burden.[8] In addition, MTA has requested that we grant an "interim suspension"[9] of its obligation to negotiate and to arbitrate certain interconnection services while we considered its petition for a three-year suspension.

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[4]47 U.S.C. § 251(c)(1).

[5]Letter from D. Tindall, GCI, to B. Berberich, MTA, filed February 28, 2005.

[6]Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) amending the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*

[7]*Matanuska Telephone Association's Petition for Suspension and Modification of Certain Section 251(e) Obligations Pursuant to Section 251(f)2) of the Telecommunication Act of 1996*, filed May 27, 2005.

[8]Through the remainder of this order we refer to MTA's request, including the option for two additional one-year periods, as a "three-year" request for suspension.

[9]In order to promote clarity, we use the term "interim suspension" in this Order to refer to MTA's petition to temporarily suspend certain arbitration obligations. While the phrase "interim suspension" is not used in the Act, 47 U.S.C. § 251(f)(2) refers to our ability to "suspend enforcement of the requirement or requirements to which the petition [for a suspension and modification] applies."

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Exhibit A

In Order U-05-46(2),[10] we denied MTA's petition for interim suspension without prejudice, primarily because MTA's arguments focused on the costs and resource burdens associated with arbitration. We noted that GCI and MTA had yet to reach the arbitration stage (at that time) and allowed the parties to continue to negotiate. We stated that we would not grant MTA's petition for interim suspension while the negotiation period was underway.

On July 15, 2005, GCI filed a request with us for arbitration of certain interconnection issues.[11] We opened Docket U-05-76 to address GCI's arbitration request. MTA renewed its petition for suspension and modification in this proceeding.[12] In its filing, MTA asked that we grant an interim suspension of the obligation to arbitrate any provision of the MTA/GCI interconnection agreement, including the services described under Section 251(c)(1)-(6), except for resale of wholesale under Section 251(c)(4) and the related obligation to negotiate in good faith while we consider MTA's request for a three-year suspension.

[10]Order U-05-46(2), *Order Denying Without Prejudice, Request for Suspension of Obligation to Negotiate and Arbitrate Certain Interconnection Services,* dated July 8, 2005.

[11]*Petition for Arbitration,* filed July 15, 2005.

[12]*Matanuska Telephone Association's Renewed Motion for Suspension and Modification of Certain Section 251(c) Obligations (Request),* filed August 9, 2005.

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GCI opposed MTA's request for interim suspension.[13] GCI supported its filing, by submitting the affidavit of Frederick W. Hitz, III. MTA replied to GCI's opposition.[14]

Discussion

Under federal law, a rural local exchange carrier (LEC) is exempt from the obligations imposed under Section 251(c) (including the duties to provide unbundled network elements and wholesale services to its competitors) unless a state regulatory commission lifts the LEC's rural exemption or determines that the rural exemption is otherwise not applicable.[15] In Order U-04-20(4)/U-04-47(2),[16] we determined that the rural exemption for much of MTA's service area did not apply to GCI under Section

[13] *GCI's Opposition to MTA's Request for a Stay of its Duty to Arbitrate (Opposition)*, filed August 19, 2005; *Affidavit of Frederick W. Hitz III (Affidavit)*, filed August 19, 2005.

[14] *MTA's Reply to GCI's Opposition to MTA's Renewed Request for Suspension and Modification of Certain Section 251(c) Obligations (Reply)*, filed August 25, 2005.

[15] 47 U.S.C. § 251(f).

[16] Order U-04-20(4)/U-04-47(2), *Order Requiring Negotiations; Granting, In Part, Motion to Compel; Denying Motion to Strike, Motion to Dismiss, Motion for Declaratory Relief, and Motion for Directed Verdict; and Affirming Electronic Rulings*, dated February 18, 2005 at 22.

Docket U-04-20 is entitled: *In the Matter of the Request by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Local Interconnection with MATANUSKA TELEPHONE ASSOCIATION, INC., Pursuant to 47 U.S.C. §§ 251 and 252*; Docket U-04-47 is entitled: *In the Matter of the Petition by GCI COMMUNICATION CORP. d/b/a GENERAL COMMUNICATION, INC. and d/b/a GCI for Arbitration with MATANUSKA TELEPHONE ASSOCIATION, INC., Under 47 U.S.C. §§ 251 and 252 for the Purpose of Local Exchange Competition.*

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251(f)(1)(C).[17] Our ruling allowed GCI an opportunity to seek interconnection services from MTA.[18]

Federal statute however, allows MTA the opportunity to effectively reinstate a portion or all of its rural exemption by filing a request for suspension of, or modification to, the obligations imposed on ILECs by Sections 251(b)-(c).[19] If the request for suspension and modification is granted, in whole or in part, the scope of issues subject to arbitration in Docket U-05-76 and the level of interconnection provided by MTA to GCI could be limited.

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[17]47 U.S.C. § 251(f)(1)(C) provides that an incumbent local exchange carrier's (ILEC's) rural exemption does not apply to a cable operator seeking to provide telecommunications service in an area where the rural ILEC provides video programming.

[18]In that Order, we determined that MTA's rural exemption did not apply against GCI in the geographic area defined by the MTA Vision certificate. After MTA filed for reconsideration, we reaffirmed that decision by Order U-04-20(6)/ U-04-47(4), Order *Denying Reconsideration and Granting Clarification*, dated May 9, 2005.

[19]47 U.S.C. § 251(f)(2), states in part:

> A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines . . . may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsections (b) or (c) of this [251]section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -
>
> (A) is necessary –
>
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
>
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
>
> (iii) to avoid imposing a requirement that is technically infeasible; and
>
> (B) is consistent with the public interest, convenience, and necessity.

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Federal statute also provides that we may suspend an arbitration proceeding (i.e., Docket U-05-76) while we consider MTA's petition for the three-year suspension and modification of certain interconnection duties. Specifically, 47 U.S.C. § 251(f)(2) provides, in pertinent part: "[t]he State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers." We now apply this provision to MTA's petition for suspension and modification.

Standard of Review

MTA and GCI disagree as to what standard of review applies to MTA's petition for interim suspension of its interconnection obligations. MTA and GCI also dispute each others claims as to whether harm or efficiencies would occur if the request for interim suspension is either granted or denied. MTA and GCI each argue that the other party did not present credible support for its position.

We initially stated that we would apply the "balance of hardships" standard of review in evaluating MTA's request for interim suspension and modification.[20] GCI now has argued that MTA's petition is essentially a "request for stay" and as a result should be evaluated under a "probability of success" on the merits standard of review.

[20]Order U-05-46(2), *Order Denying Without Prejudice, Request for Suspension of Obligation to Negotiate and Arbitrate Certain Interconnection Services,* dated July 8, 2005 at 2-3.

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GCI stated that the "balance of hardships" test is a more lenient standard that only applies where the party seeking the stay demonstrates that it will suffer "irreparable harm" and the opposing party can be adequately protected. GCI asserted that MTA has not shown it will suffer irreparable harm if required to arbitrate interconnection services, nor has MTA shown that GCI will be protected from the granting of the stay. GCI stated that MTA has not adequately shown it will prevail on the merits.[21]

MTA asserted that GCI did not object to the "balance of hardships" standard at the June 30, 2005 hearing, or after Order U-05-46(2) was issued. MTA stated that using a "probability of success" test lacks legal support as that standard applies to relief that is more permanent in nature, such as injunctions. MTA stated that even in those situations, a court will only require a showing of probable success on the merits when the party seeking relief does not stand to suffer irreparable harm.[22]

The governing federal statute does not identify the precise standard of review applicable in determining whether a state commission may grant interim relief. We have therefore carefully reviewed the authorities cited by the parties, in *Keane v. Local Boundary Comm'n.*[23] and *A.J. Industries, Inc. v. Alaska Public Service Comm'n.*[24] We now conclude that the "balance of hardships" test remains the appropriate standard in this proceeding. *AJ Industries* provides that a clear showing of probable success on merits is not required before preliminary injunctive relief is issued where the party seeking an injunction stands to suffer irreparable harm and the opposing party can be

[21] *Opposition* at 4-5.

[22] *Reply* at 2.

[23] 893 P.2d 1239 (Alaska 1995).

[24] 470 P.2d 537 (Alaska 1970).

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adequately protected from injury.[25] We find that MTA has demonstrated that it will suffer irreparable harm if interim suspension is not granted while GCI has not adequately shown that it will face significant harm if MTA's request is granted. Under these circumstances, we apply the "balance of hardships" standard of review in evaluating MTA's request for interim suspension.

Application of the "Balance of Hardships" Test

MTA seeks interim suspension of certain obligations under Section 251(c) by arguing that it would exceed its capabilities and resources and that fundamental fairness principles would be violated if we require MTA to simultaneously participate in both the arbitration proceeding in Docket U-05-76 and the suspension/modification proceeding in Docket U-05-46. MTA stated that its limited resources, the volume of work anticipated, the costs, and the short, overlapping deadlines involved would preclude MTA from adequately presenting its case in both proceedings.[26] GCI disputed virtually all of MTA's arguments and contended it would be significantly harmed if the interim suspension request was granted.[27]

Burden on MTA - Complexity of Arbitration Process

MTA and GCI dispute the complexity of the arbitration process. MTA contends that the arbitration will demand an enormous amount of its time, noting that the impasse log[28] associated with the arbitration contains 129 unresolved issues of varying magnitude and there are more disputed issues than represented in the log. As

[25] *Id.* at 4.

[26] *Request* at 2-3, 12, 16, 21; *Reply* at 3, 5.

[27] *Opposition* at 8.

[28] *Request*, Ex. 1. This is a log as of August 1, 2005, and was also submitted by MTA on August 9, 2005, in support of its opposition to GCI's petition for arbitration in Docket U-05-76.

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an example, MTA noted that no negotiation of pricing has occurred to date, and stated that arbitration of prices for each rate element is a complex and time consuming process given there are 207 separate recurring and non-recurring rate elements. MTA also cited complex unresolved operational support system (OSS) issues that it alleged will require extensive testimony and expense to arbitrate,[29] and indicated that the parties even disagree on the level of operational and procedural detail to include in the interconnection agreement.[30]

GCI asserted that MTA has greatly exaggerated the complexity of the issues that may go to arbitration[31] and provided the affidavit by Frederick W. Hitz in support. Mr. Hitz stated that he believes the parties will likely resolve many of the issues detailed in the impasse log, and argued, in part, that many of the listed contract issues concerned boiler plate language that would likely be resolved prior to the arbitration hearing. Mr. Hitz suggested that based on a cursory review, GCI may not have any disputes with MTA's model run.[32] Mr. Hitz created a three-page list of what he believes are the unresolved contract issues.

GCI contended that if the unbundled network element (UNE) issues in Dockets U-05-46 and U-05-76 were addressed on a consolidated basis, then only the issues not related to UNE pricing would remain to be litigated at the arbitration

[29]MTA stated that arbitration of OSS issues is exacerbated by the fact that MTA is a small, rural ILEC lacking automation for most of its OSS systems, raised issues of MTA's practical ability and legal obligation to provide access to its back office systems. MTA referred to "pre-order, order, provisioning, maintenance and repair and billing" as its back office systems.

[30]*Request* at 5-10.

[31]*Opposition* at 10-11.

[32]*Affidavit* at 9-12.

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hearing.[33] In response to GCI's comments regarding the number of disputed issues, MTA stated that its impasse log is accurate and has been used by the parties in the past to note disputed issues.[34]

While it appears that many interconnection issues may be resolved thorough negotiation, many issues still remain. There are approximately five weeks between the date of this Order and the time when the arbitrator must release a recommended final decision (October 28, 2005) in Docket U-05-76. Even under GCI's impasse issues list[35] there are approximately thirty unresolved issues, in addition to the development of an interconnection rate sheet that would need to be arbitrated during that time. We find that the outstanding arbitration issues remain complex and will be time consuming to resolve.

Burden on MTA - Cost of Arbitration

MTA stated that it is a small company and that its cost of arbitration (estimated at $750,000 to $1 million dollars) represents more than 18 percent of its net margin and therefore poses serious financial hardship on the company. MTA notes that GCI has budgeted $300,000 for the arbitration proceeding, not including in-house legal expenses. MTA further noted that ultimate success on its request for suspension of certain Section 251(c) service obligations would eliminate the need to arbitrate rates and terms for those services. MTA also questions the reasonableness of requiring MTA

[33] *Id.* at 5; *Opposition* at 13. Mr. Hitz also states that MTA does not take into account the efficiencies of having a consolidated UNE evidentiary record, and as a result MTA sets forth in the Impasse Log all the UNE pricing issues that under GCI's proposal would be heard once in a consolidated forum. *Affidavit* at 6-7.

[34] *Reply* at 9-10.

[35] *Affidavit*, this list is attached to the affidavit of Mr. Hitz.

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to incur the expense of arbitrating those service rates and conditions when arbitration may be unnecessary.[36]

GCI stated that MTA's claim of a financial expense for arbitration of $750,000 is exaggerated, but even if it were accurate, the expense would only represent 1 percent of MTA's total operating expenses for 2003. GCI stated that it believes that MTA should be able to recover at least some portion of this figure through interstate access charges.[37] GCI also stated that MTA is blurring the distinction between the financial harm MTA would suffer from having to lease UNEs to GCI with the costs of arbitration. GCI asserted that the only relevant harm under a balance of hardships test would be the alleged harm to MTA from having to arbitrate interconnection services.[38]

MTA's 2004 Annual Financial report information confirms that $750,000 represented about 18 percent of MTA's net income ($4 million) and about 1 percent of MTA's operating expenses ($56 million).[39] While 18 percent of MTA's net income appears to be a significant cost, we note that a portion of the $750,000 may already have been spent given MTA's extensive testimony and model work provided through Docket U-05-46. We also note that as of the end of year 2004, MTA had cash assets of $5.5 million, retained earnings of $89 million, and declared dividends of $4 million.[40] MTA has not asserted an inability to pay the costs of arbitration, and MTA's financial

[36] *Request* at 17.

[37] *Opposition* at 12.

[38] *Id.* at 2.

[39] MTA Annual Report filed with the Commission on May 2, 2005.

[40] *Id.*

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documents indicate that MTA has the financial ability to engage in an arbitration proceeding if required to do so.

While MTA may have the ability to cover the costs of full arbitration of interconnection issues, the issue remains whether MTA and GCI are burdened by facing the significant cost of a full arbitration proceeding - a cost which may be unnecessary should MTA succeed on the merits on its three-year suspension request in Docket U-05-46. MTA serves a little over 58,000 access lines.[41] Distributing the $750,000 in estimated costs over the customer base would be about $13 per customer line, ignoring the potential for recovery through access fees.[42] This per-line cost, coupled with the fact that the cost of arbitration is approximately 18 percent of MTA's net income, demonstrates that incurring the costs of a full arbitration will be a hardship to MTA.

Burden on MTA - Complexity of the Suspension and Modification Process

MTA stated that the suspension and modification proceeding will be "time consuming and complex and will require, on a full-time basis, the attention of many MTA employees, consultants, and MTA's counsel, between now and the end of October." MTA stated that it had nine witnesses preparing prefiled testimony and it must also respond to GCI's discovery requests.[43]

GCI has not contested that the suspension and modification proceeding will be both complex and time consuming. GCI asserted that consolidating the arbitration and suspension and modification UNE related issues will lead to efficiencies

[41]FCC Monitoring Report, universal service loop counts, based on 2000 data.

[42]GCI has not clearly demonstrated that any of the $750,000 is related to UNE losses from MTA having to lease to GCI, so we discount the argument that the $750,000 estimate is related to factors beyond arbitration.

[43]*Request* at 11.

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given that UNE rates would only need to be developed once.[44] Mr. Hitz also stated that if the UNE issues in Dockets U-05-46 and U-05-76 were addressed on a consolidated basis, then only issues not related to UNE pricing would remain to be litigated at the arbitration hearing.[45]

Based on the volume and nature of the testimony and number of witnesses presented by MTA, we find that the suspension and modification proceeding will be both complex and time consuming to resolve. This supports our previous finding that it will be a burden on MTA to simultaneously participate in both the arbitration proceeding and the suspension and modification proceeding.

Burden on MTA - Effect of Overlapping Proceedings on Ability to Present Case

MTA stated that it lacks the human resources to simultaneously participate in the arbitration proceeding and the suspension/modification proceeding given the overlapping schedule in each. Arbitration will likely occur during September and October in order to meet the arbitrator's recommended decision deadline of October 28, 2005.[46] In the suspension/modification proceeding, testimony from MTA was due August 18, 2005, and GCI's testimony was due September 20, 2005. MTA's reply testimony is due October 17, 2005, with a hearing commencing October 24, 2005. The deadline for the suspension/modification proceeding is December 20, 2005. It is undisputed that the arbitration and suspension/modification proceedings have overlapping deadlines.

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[44] *Opposition* at 13-14.

[45] Mr. Hitz also states that MTA does not take into account the efficiencies of having a consolidated UNE evidentiary record, and as a result MTA sets forth in the impasse log all the UNE pricing issues that under GCI's proposal would be heard once in a consolidated forum. *Affidavit* at 7.

[46] The deadline for final Commission decision in the arbitration case is November 28, 2005.

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MTA stated that it would be required to participate in the arbitration at the same time it is responding to GCI's extensive discovery requests, reviewing GCI testimony, preparing discovery requests to submit to GCI, and preparing reply testimony in Docket U-05-46. MTA stated that both proceedings involve largely the same witnesses and involve the same two lawyers, and that dividing the MTA team members into two separate Dockets would make the teams unworkable. MTA concluded that the current simultaneous procedural schedules result in a substantial and impossible hardship to the point where MTA will be prevented from effectively presenting its case in either the arbitration proceeding or the suspension/modification proceeding, "dooming both to failure and MTA to bankruptcy."[47]

GCI argued that added efficiencies will be gained by consolidating the arbitration and the suspension/modification proceeding on the subject of the UNE prices. GCI stated that this would save the Commission time and resources and would save the parties considerable expense associated with having its attorneys and consultants addressing UNE pricing issues in two separate hearings.[48] As previously indicated, GCI also disputed MTA's contention that the extent of unresolved arbitration issues would be so extensive as to compromise MTA's ability to present a fair case.[49]

GCI stated that MTA's claim of great harm due to having to staff both the arbitration and the suspension/modification proceeding ignores the extensive modeling work MTA has already completed. GCI contended that the modeling work MTA has already done will eliminate a great deal of the work that normally occurs at arbitration.[50]

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[47] *Reply* at 3-5.

[48] *Opposition* at 13, 16.

[49] *Id.* at 11-12.

[50] *Id.* at 11.

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We believe that extensive work remains on the arbitration case even if UNE pricing issues are resolved. GCI's list of unresolved arbitration issues provided by Mr. Hitz[51] contains a large number of issues not directly related to UNE rates. GCI did not dispute that the same MTA staff would be involved in both the arbitration and the suspension/modification proceedings. MTA has made a valid case that its staff would be burdened by working on both cases simultaneously. We find that the overlapping timelines and filing schedules would impact MTA staff should both the arbitration and the suspension/modification proceedings be conducted simultaneously. We also find that MTA's ability to adequately represent its position in both cases could be negatively impacted by the need to handle these proceedings simultaneously.

Burden on MTA/ GCI - Inefficiency & Potential for Gaming

MTA asserted that it would be a waste of time, effort, and money to move forward with the arbitration given its position that it will prevail on the merits of its request for suspension/modification.[52] GCI stated that allowing the two proceedings to go forward on parallel tracks will allow the Commission to consolidate the evidentiary record on UNE pricing between the two proceedings, thereby minimizing the costs associated with having attorneys and experts testify on UNE pricing in two separate proceedings. GCI stated the Commission would also benefit by having actual UNE rates for deciding the merits of MTA's financial harm rather than projections. [53]

GCI stated that combining the proceedings would also prevent a party from gaming the system by projecting a certain level of UNE rates in Docket U-05-46,

[51] *Affidavit,* attachment to the affidavit of Frederick W. Hitz III, dated August 19, 2005. For example, the list includes outstanding issues on OSS and Local Number Portability, both of which may be difficult to resolve.

[52] *Request* at 17.

[53] *Opposition* at 3.

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but later advocating for different UNE rates at arbitration.[54] MTA disputed the gaming and efficiency argument raised by GCI. MTA stated little would be gained by conducting a simultaneous review of UNE rates both in Docket U-05-46 and U-05-76 since a precise UNE rate is not necessary to confirm that MTA would be unduly financially harmed by provision of UNEs.[55] MTA asserted that it has met its burden even under a probability of success standard as it has made a prima facie case that even with the most optimistic UNE-loop rate of $38.18, MTA will likely face insolvency.[56]

We find there may be some efficiencies associated with addressing all UNE price issues simultaneously. These efficiencies will be a factor considered in our

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[54] *Id.*

[55] *Reply* at 9. MTA stated that its projected UNE price ($38.18) would have to effectively double for it to make a material difference in MTA's financial harm analysis in Docket U-05-46. MTA stated that GCI said there will likely be minimal dispute of MTA's modeling work if the Docket U-05-46 model is used in the arbitration proceeding. MTA also contended that should the UNE rate be lower, then MTA's undue economic analysis "becomes even more frightening."

[56] *Reply* at 13-14. MTA cited the following factors that it believes supports its contention that the $38.18 loop rate is the highest rate that a TELRIC model would generate through arbitration: (1) MTA calculated the $38.18 rate using the same MSM model that we adopted to determine UNE rates in the last ACS-GCI arbitration in Fairbanks, and which has been ordered for use in the arbitration between MTA and GCI; (2) MTA's model inputs were guided by our input determinations in the recent GCI-ACS Anchorage arbitration in Docket [Order] U-96-89(42); and (3) MTA's UNE rate calculation assumed that MTA would "win" each decision over each input, resulting in a best-case UNE rates. *Id.* at 8.

Order U-96-89(42), *Order Setting Prices For Access To Unbundled Network Elements, Resale And Terms And Conditions Of Interconnection And Dissenting Statement of Commissioner James S. Strandberg*, dated June 25, 2004.

Docket U-96-89 is entitled: *In the Matter of the Petition by GCI COMMUNICATIONS CORP. d/b/a GENERAL COMMUNICATION, INC., and d/b/a GCI for Arbitration under Section 252 of the Telecommunications Act of 1996 with the MUNICIPALITY OF ANCHORAGE d/b/a ANCHORAGE TELEPHONE UTILITY a/k/a ATU TELECOMMUNICATIONS for the Purpose of Instituting Local Exchange Competition.*

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final determination of the balance of hardships. We also believe there is a legitimate concern on GCI's part that there is a potential for MTA to "game" the system by advocating for different UNE model inputs during the arbitration than in the suspension/modification Docket. However, holding a simultaneous arbitration on UNE issues is not the only way to deter gaming. We shall review the evidence provided during the suspension/modification proceeding, including how MTA selected its UNE model inputs when it produced the $38.18 loop rate. Should the arbitration proceeding move forward, then our evaluation of MTA's credibility will be based in part on whether and why MTA modifies any inputs or other factors in the later proceeding that could have the effect of materially increasing the UNE rates – particularly if the modified input or factor could have or should have been reasonably anticipated in Docket U-05-46. We will take appropriate action should MTA provide inconsistent or contradictory testimony in the Docket U-05-46 and U-05-76 proceedings.

Burden on GCI - Delay

GCI argued that granting the request for interim suspension could delay its entry into the MTA market for a very long time. GCI also argued that this delay represents a financial harm due to lost business opportunities, and harms GCI's position in the market place as it allows MTA opportunity to aggressively market its products and services (including its video services) in an effort to "firmly entrench itself with customers before GCI enters the market."[57] We note, however, that MTA as the incumbent is already well known and the sole provider of local service in its market. Issues related to video services are addressed below in this Order.

GCI stated MTA has incorrectly represented that granting its petition would only stay GCI's right to arbitrate UNEs under Section 251(c), and asserted that

[57] *Affidavit* at 4; *see Opposition* at 15.

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MTA's petition is designed to create delay to prevent GCI from competitively entering the market. GCI asserted it would also be forced into re-negotiating basic interconnection services under Section 251(a) and (b), where there is no federal arbitration timeline.[58] In response, MTA stated it does not object to GCI introducing facilities-based competition in its territory and does not intend to require GCI to start the negotiation period anew.[59] MTA also contended that on April 13, 2005, MTA offered to immediately negotiate resale at wholesale rates, but GCI rejected its offer. MTA claimed that if GCI had accepted its offer, GCI's entry into the MTA service area would have been accelerated.[60] MTA stated that a stay of arbitration does not harm GCI because GCI does not have the right to UNEs"[61] and argued there can be no irreparable harm if there is no irreparable right.

We believe that documents filed in Docket U-05-4 are relevant to GCI's arguments: GCI's letter[62] to the Commission and its application[63] to provide local service in several areas, including MTA's service area. We incorporate those documents into the record by reference. GCI does not currently have authority to

[58] *Opposition* at 6-7.

[59] *Reply* at 13.

[60] *Id.* at 11.

[61] *Id.*, MTA stated that any rural LEC has the right to suspension of Section 251(b) and (c) obligations and once such a request for suspension is made, no competitor has a "right" to UNE rate elements.

[62] Docket U-05-04, letter from J. Jackson, attorney for GCI, to the Commission, filed February 18, 2005.

Docket U-05-4 is entitled: *In the Matter of the Application by GCI COMMUNICATION CORP. for an Amendment to its Certificate of Public Convenience and Necessity to Operate As a Competitive Local Exchange Telecommunications Carrier.*

[63] *Application by GCI Communication Corp. to Amend its Certificate of Public Convience and Necessity to Provide Local Exchange Service*, filed January 21, 2005.

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provide local service in MTA's area, though GCI has an application for certification pending in Docket U-05-4. In that Docket, GCI represented that it does not plan to have service available in MTA's service area until 2007.[64] GCI has also represented that it does not require Section 251(c) interconnection services from MTA in order to serve the entire MTA service area.[65] We therefore place little weight on GCI's argument that delays in arbitration at this stage will lead to material lost business opportunities.

Burden on GCI – Piecemeal Proceedings

GCI raised a second argument regarding inefficiency. GCI argued that granting the petition would lead to inefficiency as it would be required to potentially have three separate interconnection related proceedings before GCI could obtain an interconnection agreement covering all interconnection services under 251(a)-(c). The three proceedings would involve i) resolution of interconnection services under 251(a) and (b);[66] ii) resolution of wholesale services under 251(c); and iii) resolution of interconnection services under 251(c) that GCI states are essential for it to utilize the cable facilities in an efficient manner.[67]

[64] *See* n.61 at 4.

[65] *See* n.61 at 3-4, GCI states: "However, this application [for local exchange service] is not dependent on the availability of unbundled network elements, wholesale resale, or on a decision by the Commission on whether or not the affected local exchange companies [one of which is MTA] have or should retain a rural exemption."

[66] GCI claimed that MTA's position is that if the stay is granted, GCI and MTA would have to commence a new round of negotiations under Section 251(a) and (b) in order for GCI to obtain basic interconnection services and number portability, and GCI will be precluded from finalizing interconnection terms under Section 251(c)(2) unrelated to the purchase of UNEs. GCI stated this could lead to added delays, which could take up to an additional year for resolution. *Opposition* at 6.

[67] *Opposition* at 12-13.

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MTA responded by stating it "would address issues related to wholesale and facilities-based interconnection, in addition to acknowledging its existing obligations under Section 251(a) and (b)."[68] MTA implied that it saw no reason why facilities-based interconnection could not proceed on an expedited basis.[69]

MTA stated that to the extent the interim suspension presents any inefficiencies, Congress deemed that such inefficiencies could well be secondary to the need to give a rural telephone company adequate time and resources to present its petition for suspension or modification. In support of its assertion of Congressional intent, MTA stated that Congress would not otherwise have given state commissions the authority to suspend Section 251(b) and (c) obligations while considering the merits of a petition for suspension and modification.[70] We find MTA's arguments persuasive on this point.

Burden on GCI – Ability to Compete

GCI stated that if the MTA's request for interim suspension is granted, GCI will not have access to "necessary interconnection and such adjunct services as number portability that are vital for GCI's facilities based entry."[71] MTA disputed that GCI would have to wait for the outcome of its petition to gain access to the interconnection it needs to utilize its cable facilities in an efficient manner. MTA stated it would address issues related to wholesale and facilities-based interconnection as well as its existing obligations under Section 251(a) and 251(b). MTA stated that the parties agree on several substantial issues that would be required to be negotiated for any

[68] *Reply* at 12.

[69] *Id.* at 12-13.

[70] *Id.* at 16.

[71] *Opposition* at 6.

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facilities-based interconnection agreement.[72] MTA stated that its objection to interconnection has always been related only to the provision of UNEs and the related TELRIC rate that imposes a significant undue economic burden on MTA.[73]

As indicated earlier, GCI is on record in Docket U-05-4 as stating its application for local service in MTA's area did not depend on the availability of unbundled network elements, wholesale resale, or on a decision by this Commission on whether or not any incumbent local exchange company has or should retain a rural exemption.[74] MTA has also committed to addressing issues related to wholesale and facilities-based interconnection, in addition to acknowledging its existing obligations under Section 251(a) and (b).[75] MTA saw no reason facilities-based interconnection could not proceed on an expedited basis.[76] We will hold MTA to these commitments. As a last point, GCI indicated it did not plan to make service available in MTA's area until 2007.[77] We find that GCI did not demonstrate that it will be unable to compete in accordance with its stated plans if we grant interim suspension of portions of the arbitration proceeding.

[72]MTA indicated the parties have reached agreement on several sections of the interconnection agreement, including Section 7 (Interconnection), Section 8 (Collocation), and Section 14 (Dialing Parity). MTA states that the parties also agree on Section 10, Ancillary Services (E911, LNP, Pole attachments, etc.) with the exception of geographic number portability.

[73]*Reply* at 12.

[74]*See* n.61.

[75]*Reply* at 12.

[76]*Id.* at 12-13.

[77]*See* n.61.

Exhibit A

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Harm to GCI – Video Market Issues

GCI argued that it is harmed by virtue of MTA being able to enter the video services market while GCI is denied the ability to enter the local exchange market due to delay, allowing MTA to continue to "unfairly reap the benefits of its decision to compete in the video services market contrary to the *quid pro quo* in Section 251(f)(1)(C)." GCI believes that granting a stay would exacerbate this unfair situation.[78] GCI also stated that any alleged harm to MTA is the result of its conscious decision to enter the video services market, and thus surrender its rural exemption.[79]

MTA argued there is no merit in GCI's argument that MTA's harm is of its own making as it decided to enter the video service market and surrender its rural exemption. MTA contended that how it lost its rural exemption is irrelevant to whether or not to stay any portion of Section 251(b) or (c). MTA stated that instead the Commission must decide the narrow issue of whether to suspend MTA's obligation to arbitrate certain interconnection issues while the Commission hears and considers MTA's petition for suspension and modification.[80]

We find that while GCI may face a disadvantage associated with MTA marketing of video services when GCI cannot market local services in the MTA service area, the extent of this disadvantage is unclear. It is unclear how any potential disadvantage would be materially remedied by denying the interim suspension given that GCI does not plan to begin service in MTA's area until 2007.

[78] *Opposition* at 10.

[79] *Id.* at 8.

[80] *Reply* at 10.

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Summary of Findings on "Balance of Hardships" Test

Based on our above findings, we conclude that MTA has made a greater showing of potential hardship. In reaching this conclusion, we have reviewed the burden on MTA to simultaneously participate in both the arbitration proceeding and the suspension/modification proceeding, and weighed this potential burden on MTA against the potential harm faced by GCI should the arbitration proceeding be temporarily suspended.

Any efficiencies and benefits associated with denying the interim suspension is out weighed by the cost, impact on staffing, and other hardships faced by MTA as discussed in this Order. In contrast, the short delay associated with resolution of Docket U-05-46 issues prior to resolution of certain arbitration issues does not pose similar hardships to GCI. We conclude that application of the balance of hardships test favors MTA.

We therefore grant MTA interim suspension of its obligations to arbitrate an interconnection agreement, including the services described in 47 U.S.C. § 251(c)(1)-(6), but excluding resale at wholesale[81] and the related obligation to negotiate in good faith,[82] while we consider MTA's request for a three-year suspension of certain of its interconnection obligations. We clarify that our decision herein provides an interim suspension of *arbitration* obligations for certain services. Nothing in this Order should be viewed as prohibiting continued negotiations or as prohibiting other obligations that may exist under Section 251. Insufficient evidence has been filed to support a suspension of obligations beyond those related to arbitration.

[81] *See* n.2.

[82] *See* n.3.

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Condition on the Arbitration Proceeding

GCI stated: "[i]f MTA offers financial harm arguments on the basis of a $38.18 UNE rate figure and loses in this proceeding [Docket U-05-46], it should not be permitted to advocate for a higher Total Element Long-Run Incremental Cost (TELRIC) rate at the arbitration."[83] We will not prevent MTA from advocating a higher UNE rate in the arbitration proceeding should that aspect of the proceeding continue; there may be legitimate reasons why MTA would advocate a higher UNE rate. However, as indicated earlier, MTA's credibility before us will be weighed based in part on whether it changes its position after strongly asserting that $38.18 is the highest possible UNE loop rate likely to result from the arbitration proceeding and on the reason for the change. We will take into consideration whether MTA offers conflicting positions in Dockets U-05-46 and U-05-76.

ORDER

THE COMMISSION FURTHER ORDERS:

1. The *Petition for Suspension and Modification* filed by Matanuska Telephone Association, Inc. on May 27, 2005, is granted on an interim basis as further discussed in the body of this Order.

[83] *Opposition* at 14.

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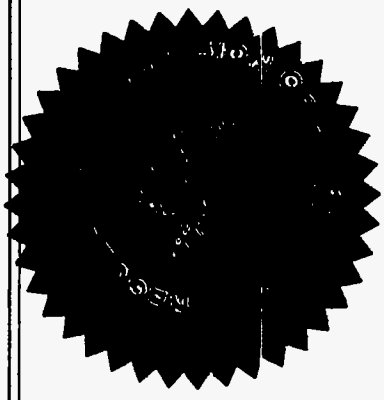
2. Matanuska Telephone Association, Inc. shall not be obligated to arbitrate an interconnection agreement, including the services described in 47 U.S.C. § 251(c)(1)-(6), but excluding resale at wholesale and the related obligation to negotiate in good faith, while the Commission considers the merits of the Matanuska Telephone Association, Inc. request for a three-year suspension of certain interconnection obligations in Docket U-05-46.

DATED AND EFFECTIVE at Anchorage, Alaska, this 21st day of September, 2005.

BY DIRECTION OF THE COMMISSION



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Matanuska Telephone Association, Inc.

Comparative Analysis of GCI Economic Benefit from UNE Competition

Description	MTA	ACS of Fairbanks	ACS of Juneau	ACS of Anchorage
UNE-L Payment	$ (38.18)	$ (23.00)	$ (18.00)	$ (18.64)
USF Receipt	32.01	8.61	3.99	0.76
Access Savings	19.38	25.51	19.63	20.18
before Local End-User Charges	**$ 13.21**	**$ 11.12**	**$ 5.62**	**$ 2.30**

USF Relative to UNE-L

USF as % of UNE	84%	37%	22%	4%

Exhibit B